IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.159 of 1993

Sathappan .. Appellant

-Vs-

1. Santhayee
2. Govindaraj
3. Arunachalam
4. Rajendran
5. Santha
6. Balakrishnan
7. Rajambal
8. Selvi
9. Muthu (minor) by mother
and guardian Santhayee .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree dated 31.1.92 in A.S.No.116 of 1990 on the file of the District Judge, Pudukkottai, confirming the judgment and decree of the Principal District Munsif, Pudukottai, dated 31.7.1990 in O.S.No.13 of 1985.

!For Appellant : Mr.S.Visvanathan

^For Respondents : Mr.S.Sundaresan

:JUDGMENT

The plaintiff, who failed in his attempts before the Courts below in getting a decree in a suit for declaration of title and for permanent injunction, has brought forth this second appeal.
2. The averments in the plaint are as follows:
The plaintiff is the son of Thangamuthu and Santhayee. The first defendant was a minor at the time his mother died. The plaintiff and his mother Santhayee were living in the house belonging to the father of Santhayee. They were looking after the property and the house belonging to the maternal grandfather of the plaintiff. The plaintiff was working at Kaveri Spinning Mill in the year 1953. Out of his income, he purchased 92 cents out of 2.77 acres in Survey No.199/4 from Samiyappa Balandar in the name of his mother benami. His maternal grandfather purchased lands in the name of the first defendant out of the plaintiff's income. Out of his income, a

property measuring 1.85 acres in Survey No.119/4 was purchased in the name of his mother benami. The plaintiff was enjoying those properties. After the death of his grandfather, the plaintiff, his mother and the first defendant were living together for sometime. Thereafter, the plaintiff and his mother were living separately. When the plaintiff's mother demanded partition in her father's property, the first defendant beat her and broke her hand. She gave a complaint before the police, and a criminal case was pending before the Judicial Magistrate's Court. The first defendant filed a suit in O.S.No.557/67 stating that the suit properties were purchased in the name of the plaintiff's mother benami out of his own income. The plaintiff filed a suit in O.S.No.677/67 for damages. Both these suits were dismissed, which was also confirmed by the appellate forum. Apart from the suit property, the plaintiff was owning 4 acres of lands. His mother died in April 1984. After her death, the first defendant created a sale deed, as if she sold half of 'A' Schedule property in his favour. The plaintiff's mother has no interest in the suit properties. The house was constructed out of his own money. Since the consideration found in the said sale deed was Rs.9,425/-, the document itself is invalid. Even assuming that the plaintiff's mother has got any interest in the properties, after her death, it should come to the plaintiff as her heir. The first defendant issued a notice stating that he was in possession and enjoyment of 'B' Schedule property. Hence, there arose a necessity for filing the suit.

3. The suit was resisted by the defendants stating that the allegations that the plaintiff and his mother were living in the plaintiff's maternal grandfather's house and that out of the plaintiff's income, the suit properties were purchased in the name of his mother benami were false; that the plaintiff had frequent quarrels with his mother; that the plaintiff's mother lived in the first defendant's house; that in the criminal case, the first defendant was acquitted; that when plaintiff interfered with the first defendant's possession, he filed a suit in O.S.No.557/67; that from the date of purchase of the suit properties, the plaintiff's mother was living with the first defendant, and they were in possession of the suit properties; that the plaintiff has knowledge about the sale deed executed by his mother in favour of the first defendant; that when the plaintiff's mother was sick, she was admitted in the hospital and was looked after by the first defendant; that the plaintiff's mother executed a will on 12.7.1983 in respect of the properties other than the properties mentioned in the said sale deed, in a sound and disposing state of mind; that the properties which were sold in favour of the first defendant, were in the possession of the plaintiff's mother only; that she got the right of sale over the same; that the said Will has come into force, and hence, the suit was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and dismissed the same. An appeal filed by the plaintiff was also dismissed by the first appellate Court. The aggrieved plaintiff has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the lower appellate Court erred in law in holding that Ex.B4 is a true Will when the thumb impression in Ex.B4 does not tally with the admitted thumb impression of the plaintiff's mother in other documents?

(2) Whether the defendants can be said to have proved the due execution and attestation of the Will Ex.B4 when the attesting witnesses who are alive, have not been called to give evidence?

6. This Court heard the learned Counsel for the appellant and also the learned Counsel for the respondents on those contentions.

7. The plaintiff seeks the relief of declaration in respect of two properties, shown in 'A' and 'B' Schedules annexed to the plaint. The case of the plaintiff in short is that the first defendant is his uncle; that the plaintiff is the son of one Santhayee; that his mother Santhayee and himself were all along in the maternal grandfather's house, since nobody was to look after the first defendant, who was the child then; that both the mother and son were earning money by doing work in a mill and otherwise; that the suit properties were purchased in the name of the mother, but out of the moneys earned by the plaintiff; that there were litigations between his mother and her brother, the first defendant herein; that in all the proceedings, it was held that the first defendant had no right, interest or title in the properties; that while so, the first defendant taking advantage of the situation, had taken a sale deed from his mother in his favour; that the said sale deed is invalid, which was taken from his mother by making misrepresentation; that even the consideration found therein namely Rs.9,425/- would clearly reveal that the sale was not supported by consideration; that both the properties were in his possession and enjoyment, and thus, a decree has got to be granted in his favour. The suit was resisted by the defendants inter alia stating that both the immovable properties found in 'A' and 'B' Schedules belonged to Santhayee, the sister of the first defendant; that the plaintiff was carrying on a wayward life; that he was also not maintaining his mother, and under such circumstances, the first defendant was to take care of his sister; that she executed a sale deed in favour of the first defendant on 20.10.1977 in respect of 1 acre and 33 cents out of 2 acres and 77 cents in Survey No.119/4; that in respect of 'B' Schedule property, she executed a Will in a sound and disposing state of mind in favour of the first defendant, and pursuant to the sale deed, the first defendant was put in possession immediately; that on the death of Santhayee, the Will has come into force ; that the first defendant has been in possession and enjoyment of the properties, and hence, the suit was to be dismissed. Both the Courts have recorded a concurrent finding on both the issues that the sale deed executed on 20.10.1977 by the mother of the plaintiff Santhayee in favour of the first defendant was true and supported by consideration, and insofar as the Will as found under Ex.B4, it was true, genuine and executed by the said Santhayee in a sound and disposing state of mind, and it has also been proved. This Court is unable to notice any reason why the said concurrent finding has got to be disturbed.

8. Admittedly, both the properties were purchased by Santhayee, and the sale deeds stood in her name. No sufficient material was placed by the appellant/plaintiff to hold that it was he, who funded for the purchase; but, they were purchased in the name of Santhayee. No satisfactory explanation was forthcoming from his side why he should purchase the properties in the name of the old lady out of his money. In view of the thorough lack of evidence, both the Courts have taken a correct view that both the properties were purchased by Santhayee in her name out of her funds, and as an absolute owner of the properties, she was well competent to execute a sale deed as found under Ex.B3

and a Will as found under Ex.B4, and thus, he was not entitled to the properties.

9. The learned Counsel for the appellant inter alia would much stress that Ex.B4 Will has not been proved strictly, as expected in law; that out of the three attesting witnesses to Ex.B4 Will, one examined on the side of the plaintiff was a lawyer, who attested the document as a notary; that he deposed before the Court; that his evidence could not be believed, since he was not acquainted to the testatrix, and thus, the Will was not strictly proved; that despite the same, both the lower Courts have found that the Will was proved in accordance with law, and hence, it has got to be set aside. Attractive though the arguments of the learned Counsel for the appellant may be, this Court is of the considered opinion that it does not stand the scrutiny of law. A perusal of Ex.B4 Will would indicate that there were three attesting witnesses to the document, out of whom a lawyer aged about 82 years was examined before the trial Court. It is pertinent to point out that the said witness has clearly deposed that it was he who attested the Will, and his evidence would clearly show that the execution and attestation of the document had taken place as expected in law. In such circumstances, it would be futile on the part of the appellant to state that the Will has not been proved. This Court is unable to see any merit in this second appeal.

10. In the result, this second appeal is dismissed, confirming the judgments and decrees of the lower Courts and leaving the parties to bear their costs.

Index: yes
Internet: yes

To:

1. The District Judge
Pudukottai
2. The Principal District Munsif
Pudukottai
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/

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